No. 80-323

IN THE

Supreme Court of the United States

October Term, 1980

COLUMBIA BROADCASTING SYSTEM, INC.,

Petitioner,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief For Respondents Broadcast Music, Inc., *et al.*, In Opposition To The Petition For A Writ of Certiorari

ROBERT J. SISK
One Wall Street
New York, New York 10005
(212) 943-6500

Attorney for Respondents Broadcast Music, Inc., et al.

Of Counsel:

GEORGE A. DAVIDSON
NORMAN C. KLEINBERG
MICHAEL E. SALZMAN
HUGHES HUBBARD & REED
One Wall Street
New York, New York 10005

QUESTIONS PRESENTED

1. Did the court of appeals comply with this Court's mandate when it conducted a rule of reason inquiry on remand?

2. Did the court of appeals correctly conclude that the offering of blanket licenses does not restrain trade in direct licenses?

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Brief For Respondents Broadcast Music, Inc., *et al.*, In Opposition To The Petition For A Writ of Certiorari

Respondents Broadcast Music, Inc. ("BMI") and the defendant class of writers and publishers who have licensed their music to BMI submit this brief in opposition to the petition of Columbia Broadcasting System, Inc. ("CBS") for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

STATEMENT OF THE CASE

In 1979, this Court resolved the legal issues in this case and remanded it to the Second Circuit for further proceedings, including a factual analysis under the rule of reason,[1] a mandate by its nature not likely to generate an issue requiring another review by this Court.

On remand, the case was briefed by the parties and numerous *amici curiae* and argued for some five hours

1. This Court left it open to defendants to argue to the court of appeals that CBS had not preserved a rule of reason issue (C 25 n.44), but that court rejected this contention and considered the issue on the merits. (B 3.) References to "A," "B," etc. are to pages of the CBS Appendix.

before the court of appeals. That court unanimously rejected CBS' claims[2] and its subsequent application for rehearing *en banc*. The decision below followed precisely the guidelines of this Court's prior opinion and affirmed the well-reasoned conclusions of Judge Lasker in the district court.

The facts are clearly set forth in this Court's prior opinion and will not be restated in detail here. In 1969, CBS, which had held blanket licenses for music for some 30 years, filed this suit against BMI and the American Society of Composers, Authors and Publishers ("ASCAP") and defendant classes of writers and publishers who licensed their music through ASCAP or BMI. CBS contended that the practice of offering blanket licenses was unlawful because it restrained trade in licensing directly from copyright proprietors.

After an eight-week trial devoted primarily to the issue of the feasibility of direct licensing (A 14), the district court issued a lengthy opinion upholding blanket licensing under the rule of reason. The district court found that:

- "CBS has failed to prove the factual predicate of its claims—the nonavailability of alternatives to the blanket license," (E 92);
- "CBS has failed to prove that there are significant mechanical obstacles to direct licensing," (E 88-89);
- CBS "has [not] . . . established by credible evidence that copyright owners would refuse to deal directly with CBS if it called upon them to do so. To the contrary, there is impressive proof that copyright proprietors would wait at CBS' door if it announced plans to drop its blanket license," (E 89);
- "CBS has failed to prove copyright proprietors would not compete with one another on a price basis if CBS sought direct licenses from them," (E 92);

2. The copy of the opinion of the court of appeals on remand included as Appendix A to the CBS petition contains typographical errors at page A 11. A corrected version of that page is attached hereto as BMI Appendix 1.

- "CBS has not established that the individual defendants are unwilling to sell performance rights on a direct licensing basis at a negotiated price for each license," (*id.*);

- "CBS has failed to prove that the licensing authority of ASCAP and BMI is limited to [terms that foreclose CBS from dealing directly with copyright owners] or that copyright owners have refused or would refuse to deal with CBS directly on an individual basis," (E 94);

- "CBS has not established that ASCAP and BMI have power to control the prices in the market for performance licenses. . . . [C]ertainly the record does not establish that ASCAP and BMI could effectively control the prices at which such transactions take place," (E 96-97).

On appeal, the Second Circuit adopted all of the findings of facts of Judge Lasker but reversed on the law, holding that blanket licensing was *per se* unlawful.[3] (*E.g.*, D 10, 21.)

This Court reversed the Second Circuit on this legal issue and remanded the case to it, holding that blanket licensing is not *per se* unlawful. In its opinion, this Court made it plain that blanket licensing must be evaluated under the rule of reason, which would require:

1. an examination of the blanket licensing practice to determine whether it constituted an anticompetitive restraint, since the Court was "uncertain whether the practice . . . has the effect . . . of restraining competition" (C 13); and,

2. if a restraint was found, an investigation of whether blanket licensing had "redeeming virtues" (C 12) which made the restraint reasonable.

3. Because it also perceived benefits of blanket licensing, the court of appeals ruled that blanket licensing might nevertheless be permitted to continue as a licensing alternative. (D 21-22.)

The court of appeals thereafter conducted the "assessment under the rule of reason" contemplated by this Court. It examined CBS' claims of restraint against the facts found by the district court and concluded that the offering of blanket licenses did not constitute an anticompetitive restraint since CBS "can feasibly obtain individual licenses from competing copyright owners and . . . it incurs no risk in endeavoring to do so." (A 18.) Accordingly, the court below found it unnecessary, in affirming the district court, to engage in any weighing of pro- and anti-competitive effects.[4]

CBS asserts that the court of appeals misconstrued this Court's mandate. (CBS Pet. 14-18.) CBS claims that this Court directed the court below to assume as true a proposition which that court and the district court had found as a matter of fact to be false: that the offering of blanket licenses restrains trade in the direct licensing market. CBS also argues that if it was open to the court of appeals to consider this factual issue, the court of appeals resolved the issue incorrectly.[5] (*Id.* 18-27.)

SUMMARY OF ARGUMENT

While this Court's mandate is plain and unambiguous and while we, in any event, would hardly presume to tell this Court what it intended, we must observe that CBS' interpretation of the mandate makes no sense. CBS' construction of the mandate would have this Court ordering the

4. Both this Court and the district court cited a number of benefits of the blanket license for both users and copyright owners, including flexibility in programming, instant access to almost all music, protection against infringement, reduction in the need for monitoring and substantial lowering of transaction costs. (E 3; C 21-22.)

5. CBS' "Summary of Facts" recites as "facts" the evidentiary contentions it attempted to establish at trial, even though they were rejected by the district court and by the Second Circuit on two occasions.

court of appeals to repeat an error that led to its being reversed in the first place: to assume without proof that the practice in question constituted an anticompetitive restraint of trade. Rather, this Court directed the court of appeals to conduct a full "assessment under the rule of reason" (C 25) on remand. And an assessment under the rule of reason is what the court of appeals conducted on remand.

The court of appeals tested CBS' claims of restraint against the detailed findings of the district court—findings which the court of appeals had affirmed on the first appeal (D 10 & n.14; D 23 n.29) and which this Court had declined to disturb. The court's assessment demonstrated unquestionably that the restraints postulated by CBS had no basis in fact. Ignoring the voluminous evidence relied on by the court of appeals and the district court, CBS has combed the trial record for bits of evidence favorable to its position. CBS thus seeks in this, its fourth opportunity for appellate review, to retry the case in this Court.

CBS also attempts to portray the court of appeals decision as conflicting with opinions of this Court and courts of appeals for other circuits. No such conflict exists. The pertinent authorities are entirely consistent with the decision of the Second Circuit.

There is simply no issue worthy of this Court's attention presented by CBS. This Court remanded the case to allow the court of appeals to undertake the familiar and essentially factual exercise of evaluating the practice complained of under the rule of reason. CBS' dissatisfaction with the results of that exercise amounts to nothing more than unhappiness with what the facts show.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

POINT I.

THE COURT OF APPEALS FOLLOWED THIS COURT'S INSTRUCTIONS

In its first opinion, the court of appeals approached the case in a curious way. It assumed *a priori* that the offering of blanket licenses had an adverse effect on competition in direct licenses and declared blanket licenses *per se* unlawful.[6] Recognizing the obvious benefits of blanket licenses, however, the court was uncomfortable with the apparent consequences of its decision and went on to say that blanket licensing need not be outlawed. (D 21-22.)

This Court characterized the court of appeals' approach as

> "in effect . . . a rather bobtailed application of the rule of reason, bobtailed in the sense that it is unaccompanied by the necessary analysis demonstrating why the particular licensing system is an undue competitive restraint."

(C 17 n.27.) Accordingly, this Court directed the court below to determine whether CBS had preserved a rule of reason claim and, if so, to make "an assessment under the rule of reason." (C 25.) That assessment required the court below to:

> 1. examine the practice of blanket licensing to determine if there was an anticompetitive restraint of trade, and,

6. Judge Moore, on petition for rehearing of the court of appeals' first decision, observed that this was merely an assumption "unsupported by proof." (Judge Moore's opinion, which is not officially reported, is attached hereto in BMI Appendix 2.)

> 2. if such a restraint was found, to balance the restraint against procompetitive features of the practice to determine whether the restraint was reasonable.

This is exactly what the court of appeals did on remand.

CBS' argument here that this Court directed the court of appeals to dispense with the first part of this analysis is frivolous. The very error that the court of appeals made the first time was to assume that the practice restrained trade rather than to examine the question as a matter of fact.

POINT II.

THE CONCLUSION OF THE COURTS BELOW THAT BLANKET LICENSING DOES NOT RESTRAIN TRADE IN DIRECT LICENSES IS FULLY SUPPORTED BY THE RECORD

CBS' call for a redetermination of the facts is hardly appropriate in a request for a fourth appellate review of the case. On the first appellate review, the court of appeals affirmed the district court's findings of fact, noting they were "painstakingly set forth with clarity" (D 2); this Court declined to disturb those findings;[7] and on remand, the court of appeals praised the district court for "carefully analyzing" the evidence (A 14). There could hardly be a more appropriate case for applying this Court's rule that it will not undertake to examine questions of fact already passed on by two lower courts. *See, e.g., Graver Tank & Manufacturing Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

If the facts are considered, they show beyond doubt that the restraints claimed by CBS do not exist.[8] The court of

7. The dissent also noted that "The District Court's findings of fact are thorough and well supported." (C 27.)

8. CBS' claim that there must have been a restraint since, in Justice Brandeis' words, "every agreement concerning trade, every regulation of trade, restrains," CBS Pet. 14, *citing Chicago Board of*

appeals considered and properly disposed of all three claims of restraint mentioned in CBS' petition here (CBS Pet. 5-7):

1. The claim that direct license prices would be improperly influenced by blanket license distributions

CBS contends that the existence of the blanket license, as a matter of "economic principle" (CBS Pet. 23 n.20), will impede price competition in the direct licensing market because BMI and ASCAP distributions will influence the asking price for individual licenses. (CBS Pet. 5, 22-23.)

This claim did not even persuade the court of appeals in its first decision, when it otherwise ruled in CBS' favor:

> "We recognize that CBS contends that a blanket licensing system overhanging the market in any combination of circumstances will necessarily affect the price for each set of individual performing rights. On this record we are not convinced that this is necessarily so. And the District Court found the contrary."

(D 22 n.27.)

Recognizing that writers and publishers in a direct licensing market would face intense price competition from other writers and publishers for network performances, the court on remand had difficulty in taking seriously CBS' claim that writers and publishers would be reluctant to deal directly with CBS on a competitive price basis:

Trade v. *United States*, 246 U.S. 231, 238 (1918), is casuistry. Justice Brandeis distinguished between "restraint" in the layman's sense and "restraint of trade" as an antitrust term of art. In the latter sense, he explained, restraint refers only to activity which has an adverse effect on competition. *Cf. Standard Oil Co.* v. *United States*, 221 U.S. 1, 56 (1911). It was obviously in the familiar antitrust sense that the court of appeals found there to be no restraint here.

> "Wholly apart from the record, we have some difficulty even contemplating the feared situation of individual songwriters displaying reluctance to arrange to have their songs performed on a national television network, especially one owned by 'the giant of the world in the use of music rights.' [400 F. Supp.] at 771. But we need not rely on an intuitive rejection of this CBS claim. Judge Lasker found, after hearing substantial evidence from composers and music publishers, that if CBS were to seek direct licensing, 'copyright proprietors would wait at CBS' door.' *Id.* at 779."

(A 16.)

The facts found at trial demonstrated over and over again that the availability of a blanket license to music users gives individual copyright owners no additional price leverage whatsoever in any dealings they might have with CBS. Since individual compositions are highly fungible for television use (E 69), "copyright proprietors would deal readily on a price basis" with CBS (E 96-97); otherwise their music would not be heard on the network.

2. The claim that copyright proprietors would seek to "hold up" CBS for licenses for "music in the can"

CBS claims that it would be "held up" by copyright owners if it attempted to license directly the music contained in its inventory of pre-recorded programs. This is its "music-in-the-can" claim, which was rejected as a matter of fact by the district court. The court of appeals confirmed this finding:

> "CBS apprehended that, without a blanket license, it would be subject to demands for unconscionably high fees from the owners of copyrighted music already recorded on the soundtracks of taped programs and feature films in CBS's inventory. Judge Lasker properly rejected this claim both on the facts

> and the law. As a matter of fact, he found, based on the testimony, that 'holdups' were not realistically to be feared, that synch rights were regularly obtained at fair prices after the recording had been accomplished, that copyright proprietors would not wish to incur CBS's disfavor by attempting a 'hold-up,' and that the whole claim was undercut by the turnover in the CBS inventory. [400 F. Supp.] at 775-78."

(A 16.)

Both courts below also concluded as a matter of law that this CBS contention must be rejected:

> "Apart from the lack of factual support for the argument, Judge Lasker also correctly rejected it on the ground that it is not a consequence of the blanket license. If CBS would be vulnerable to a 'hold-up' when it tries to acquire performance rights for music on a feature film it wishes to rerun, that is a consequence of CBS's failure to acquire rerun performance rights at the time it acquired the film. At that time CBS accepted the risk that it would one day have to purchase performance rights for reruns, either as part of the purchase price for a blanket license or at a separate price for a license obtained directly from the copyright owner."

(A 16-17; footnote omitted.)

3. The claim that direct licensing would be prevented for a substantial period of time for lack of necessary direct licensing facilities

CBS' contentions that a lack of "machinery" or the "time lag" involved in creating it prevents CBS from licensing directly are met at the outset by this Court's conclusion that "there was no legal, practical, or conspiratorial impediment to CBS' obtaining individual licenses." (C 24.)

On remand the court of appeals also addressed these CBS contentions and rejected them as without factual or legal support, noting first as to the alleged lack of "machinery":

> "CBS also contended that there existed no machinery to handle the numerous transactions that would be required to obtain performance rights directly. The record establishes that such machinery is entirely feasible; indeed a single agency now serves as the broker for the thousands of transactions in which copyright owners sell television synch rights and motion picture performance rights."

(A 14-15.) The court below then analyzed and rejected CBS' "time-lag" contention:

> "Nevertheless, the claim is pressed that it would take some amount of time and money to establish a similar mechanism for the individual brokering of network television performance rights. * * * [W]e conclude that the evidence and Judge Lasker's analysis of it demonstrate that neither the time nor the expense of creating machinery for direct licensing establishes a barrier of which CBS can complain. It must be recalled that CBS has obtained its performance rights by blanket licenses ever since the late 1940's. Having transacted business in that fashion for that length of time, CBS cannot expect the antitrust laws to assure it that a changeover to direct licensing can be accomplished instantly or at no expense. Moreover, Judge Lasker found that the changeover could be begun very rapidly with CBS meeting its music needs as the machinery for direct licensing was put into place. When Justice Stevens refers to the machinery being created within a year, 441 U.S. at 35, 99 S.Ct. at 1570, he is citing the outer limit testified to by a CBS witness, 400 F. Supp. at 764, whereas Judge Lasker found that 'the relatively modest machinery required could be developed during a reasonable planning period.' *Id.* at 765."

(A 15.)

POINT III.

THE DECISION BELOW IS NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT OR OF COURTS OF APPEALS IN OTHER CIRCUITS

CBS lists a large number of decisions in this Court and in various courts of appeals with which it claims the decision of the court of appeals on remand is in conflict. Most of these are *per se* cases,[9] and this Court has already found that this is not a *per se* case. The remaining cases are ones in which, on far different facts, unreasonable restraints were proved at trial.[10] Since no unreasonable restraint was proved at trial here, the court of appeals affirmed the dismissal of the complaint:

> "[W]hat the District Court found, and what we affirm, is that CBS has failed to prove that the existence of the blanket license has restrained competition. Since the blanket license is not a *per se* unlawful arrangement, its restraining effect must be proved before § 1 liability can be found. When, after a full trial, such proof is lacking, the challenge to the blanket license is properly dismissed."

(A 19.)

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9. *Catalano, Inc.* v. *Target Sales, Inc.*, 100 S.Ct. 1925 (1980); *National Soc'y of Professional Eng'rs* v. *United States*, 435 U.S. 679 (1978); *Nationwide Trailer Rental Sys. Inc.* v. *United States*, 355 U.S. 10 (1957), *aff'g per curiam* 156 F. Supp. 800 (D. Kan.); *United States* v. *National Ass'n of Real Estate Bds.*, 339 U.S. 485 (1950); *United States v. Masonite Corp.*, 316 U.S. 265 (1942); *In re Yarn Processing Patent Validity Litigation*, 541 F.2d 1127 (5th Cir. 1976), *cert. denied sub nom. Lex Tex. Ltd.* v. *Universal Textured Yarns, Inc.*, 433 U.S. 910 (1977); *Plymouth Dealers' Ass'n* v. *United States*, 279 F.2d 128 (9th Cir. 1960).

10. *United States* v. *Container Corp. of America*, 393 U.S. 333 (1969); *Smith* v. *Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978).

The case which most nearly resembles this one is *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968), in which ASCAP's blanket licenses for radio stations were vindicated under the rule of reason on the ground, *inter alia*, that each station remained free to purchase individual licenses directly from copyright owners. As a matter of law, the Second Circuit's opinion is also well supported by this Court's decisions in *Automatic Radio Manufacturing Co.* v. *Hazeltine Research, Inc.*, 339 U.S. 827 (1950), and *Standard Oil Co. (Indiana)* v. *United States*, 283 U.S. 163 (1931).

The federal courts have been applying the rule of reason for decades; the opinion of the court of appeals here, involving a *sui generis* industry (D 3), will not likely lead other courts into error when applying that rule to other facts, other practices, or other businesses.

POINT IV.

TO GRANT THE PETITION WOULD NOT BE IN THE INTERESTS OF JUSTICE

This litigation began over a decade ago. During that period, CBS' payments to BMI have been limited to court ordered interim fees which for the years prior to 1980 were frozen at 1969 levels.[11] Had CBS been paying BMI at the rate voluntarily agreed to by another network, it would have paid BMI approximately $10 million more than it did. While the terms of the order permit BMI to seek retroactive adjustment at the end of the litigation, this adjustment by definition requires the litigation to end. In addition, this litigation has blocked resolution of BMI's state court action to recover $5 million in license fees due under the contract with CBS in effect prior to this litigation, because CBS has

11. In January 1980, the district court awarded BMI a prospective increase in the interim fee to take into account the effect of inflation.

pleaded its antitrust claims in the form of a copyright misuse defense. Ten years is a long time. Careers in music writing have begun, flourished and ended; many composers active in the early years of this suit are now dead. CBS has exploited a spurious antitrust claim to avoid paying fairly for the music it has used over a decade of record profits for CBS.

CBS has already failed to persuade the district court, the court of appeals, and this Court that the conduct it complains of restrains competition in any way. To invest further time and more judicial resources on such a claim would be to indulge CBS at the expense of justice.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT J. SISK
One Wall Street
New York, New York 10005
(212) 943-6500

Attorney for Respondents
Broadcast Music, Inc., et al.

Of Counsel:

GEORGE A. DAVIDSON
NORMAN C. KLEINBERG
MICHAEL E. SALZMAN
HUGHES HUBBARD & REED
One Wall Street
New York, New York 10005

September 29, 1980

Appendices

BMI APPENDIX 1

Corrected Page A-11 of Petitioner's Appendix

companies to which they may have assigned their copyrights. If the opportunity to purchase performing rights to individual songs is fully available, then it is customer preference for the blanket license, and not the license itself, that causes the lack of price competition among songs. Of course, even customer preference cannot save some practices from illegality under the antitrust law. If competing sellers fix the prices of their products, they violate § 1 no matter how much a buyer may prefer accepting their fixed price to negotiating with each for a lower price. But a practice that is not a *per se* violation, and this blanket license has authoritatively been found not to be such, does not restrain trade when the complaining customer elects to use it in preference to realistically available marketing alternatives.

Trade is restrained, frequently in an unreasonable manner, when rights to use individual copyrights or patents may be obtained only by payment for a pool of such rights, *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260 (1948) (copyrighted motion pictures); *Alden-Rochelle, Inc. v. ASCAP*, 80 F.Supp. 888 (S.D.N.Y.1948) (copyrighted music); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969) (patents), but the opportunity to acquire a pool of rights does not restrain trade if an alternative opportunity to acquire individual rights is fully available. *Automatic Radio Manufacturing Co. v. Hazeltine Research, Inc.*, 339 U.S. 827, 70 S.Ct. 894, 94 L.Ed. 1312 (1950) (patents); *Standard Oil Co. v. United States*, 283 U.S. 163, 51 S.Ct. 429, 75 L.Ed. 999 (1931) (same).

CBS challenges this approach on the ground that some alternatives can always be imagined that would satisfy

BMI APPENDIX 2

Order of the United States Court of Appeals for the Second Circuit Upon Petition for Rehearing and Suggestion for Rehearing En Banc, entered December 6, 1977

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of December, one thousand nine hundred and seventy-seven.

Present:

HON. LEONARD P. MOORE,

HON. ROBERT P. ANDERSON,

HON. MURRAY I. GURFEIN,

Circuit Judges.

Docket No. 75-7600

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS, AND PUBLISHERS, *et al.*,
Defendants-Appellees.

A petition for a rehearing having been filed herein by counsel for the defendant-appellee, American Society of Composers, Authors and Publishers.

Upon consideration thereof, it is Ordered that said petition be and hereby is denied.

MOORE, *Circuit Judge:*

I vote to deny the petition for rehearing with a suggestion of rehearing *en banc.* I do so only on the theory that Part III of the majority opinion remanding for further proceedings requires consideration by the trial court after proof and/or argument of the effect on price competition of the blanket license and some form of per use license. Proof should also be developed which will support or disprove the majority's assumption (thus far unsupported by proof as I see it) that the blanket license "reduces price competition among the members and provides a disinclination to compete". (p. 5189). Such lack of evidence is also conceded by the majority with respect to a finding on "market need". In short, I believe that a rehearing at this time would be premature.

As for ASCAP's argument that further proceedings "will be time consuming and expensive" and as for their desire to try many other issues, this would be a situation of their own making. It would seem to me that the issue of a practical and workable blanket-per use decree need not be befogged by a contention that "CBS's market power is too great".